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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 EDWIN N. GONZALEZ, No. C-12-0124 EMC (pr)
9 Petitioner,
10 v. **ORDER DENYING RE-
MOTION TO DISMISS**
11 TIMOTHY BUSBY, Warden, **(Docket No. 10)**
12 Respondent.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

(Docket No. 10)

15 Edwin N. Gonzalez, an inmate at the Correctional Training Facility in Soledad, filed this *pro*
16 *se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge a prison disciplinary
17 decision. Respondent has moved to dismiss the petition. The motion to dismiss is patently meritless
18 and must be denied.

19 Respondent inexplicably argues that “Gonzalez does not invoke federal habeas corpus
20 jurisdiction.” Motion To Dismiss, p. 1. The petition did “invoke” federal habeas jurisdiction by
21 citing 28 U.S.C. § 2254 on the first page of the form habeas petition, and by identifying in the text
22 that the rights allegedly violated were federal due process rights. With regard to the denial of the
23 investigative employee, the petition alleged that Gonzalez’s “right to present a defense and to
24 present mitigation evidence, by means of appointment of an [investigative employee], was ignored
25 depriving him of due process of law.” Docket # 1, p. 10. In the discussion of that claim in the
26 petition, Gonzalez cited *Wolff v. McDonnell*. Docket # 1, p. 10. The procedural protections listed in
27 *Wolff v. McDonnell*, 418 U.S. 539 (1974), include allowance of witnesses and documentary
28 evidence when not unduly hazardous, and aid to the accused where the inmate is illiterate or the

1 issues are complex. *Id.* at 566, 570. With regard to Gonzalez's biased decisionmaker claim, the
2 petition alleged that the "right to Impartial Decision Maker is well established by the Federal and
3 State Courts in the case *Wolf v. McDonnell*, *supra*," and alleged that "the I.S.P. Officers has
4 maliciously disregarded the safe guard protection of the due process." Docket # 1, pp. 12-13 (errors
5 in source). The citation to *Wolff* was incorrect because the procedural protections identified in *Wolff*
6 do not include an unbiased decisionmaker, but the allegations that the right to an unbiased
7 decisionmaker was established by federal courts and that prison officials violated Gonzalez's right to
8 due process were sufficient to allege a federal due process claim for a biased decisionmaker. Not
9 only did Gonzalez allege two federal due process claims, the Court specifically so stated in the
10 Order To Show Cause. This Court has federal question jurisdiction to decide whether Gonzalez's
11 Fourteenth Amendment due process rights were violated in the disciplinary proceedings. *See* 28
12 U.S.C. §§ 1331, 2254.

13 Respondent also urges that, because there are state regulations pertaining to investigative
14 employees and appropriate decision-makers, resolution of the claims is governed by state law. *See*,
15 *e.g.*, Motion To Dismiss, p. 2 ("Because the resolution of Gonzalez's claim that he was entitled to an
16 investigative employee depends on state law, Gonzalez has not stated a cognizable federal claim.")
17 That is legally incorrect. State laws and state regulations simply do not displace or preempt federal
18 constitutional rights; if there is any preemption, the Supremacy Clause would require the converse.
19 *See* U.S. Const. art. VI ("[t]his Constitution, and the Laws of the United States which shall be made
20 in Pursuance thereof . . . shall be the supreme Law of the Land.") Arguments about compliance
21 with, or violation of, state laws are largely beside the point in a federal habeas action because a
22 federal court does not have authority to grant habeas relief for state law errors. *See generally Estelle*
23 *v. McGuire*, 502 U.S. 62, 67 (1991) (fact that evidence was incorrectly admitted under state law "is
24 no part of a federal court's habeas review of a state conviction"); *Gilreath v. Hanks*, 95 F.3d 1154
25 (7th Cir. 1996) (table case) ("In determining whether to grant a petition for habeas corpus, we do not
26 review whether the trial judge acted in compliance with state law"); *Walker v. Sumner*, 14 F.3d
27 1415, 1419-20 (9th Cir. 1994), *overruled on other grounds in Sandin v. Conner*, 515 U.S. 472, 484
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1 (1995) (§ 1983 action - whether a due process violation occurred in prison disciplinary proceedings
2 is determined with reference to *Wolff* and its progeny, rather than the state law rules).

3 Finally, using a motion to dismiss to present evidence and argue the merits of the case – as
4 respondent has done – is improper. Threshold problems (such as lack of jurisdiction, failure to
5 exhaust, improper venue, lack of custody, mootness, and untimeliness) may be raised by motion
6 rather than in the answer. *See Lonchar v. Thomas*, 517 U.S. 314, 325 (1996) (quoting Advisory
7 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases In The United States District
8 Courts); *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989). However, these authorities do not
9 support the view that the merits should be addressed in a motion to dismiss. Using a motion to
10 dismiss to address the merits of a claim potentially gives the respondent two bites at the apple
11 because he can renew and improve his argument in his answer to the petition if he loses at the
12 motion to dismiss stage. Such a procedure also leads to the unnecessary consumption of judicial
13 resources because it requires the Court to address the same issues twice in the same case.

14 For the foregoing reasons, the motion to dismiss is **DENIED**. (Docket # 10.) In light of the
15 denial of the motion, the Court now sets the following briefing schedule for the answer and traverse
16 called for in the Order To Show Cause: Respondent must file and serve his answer no later than
17 **August 3, 2012**. Petitioner must file and serve his traverse no later than **September 7, 2012**.

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19 IT IS SO ORDERED.

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21 Dated: July 17, 2012

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EDWARD M. CHEN
24 United States District Judge
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